

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>TONY ELLIOTT</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>J &amp; J DRAINAGE PRODUCTS, CO.</b>	)	
Respondent	)	Docket No. 1,021,781
	)	
AND	)	
	)	
<b>ACCIDENT FUND INS. CO. OF AMERICA</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier (respondent) request review of the July 22, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

**ISSUES**

Following a preliminary hearing and the submission of additional evidence and testimony, the ALJ found that claimant was entitled to medical care and temporary total disability benefits commencing May 20, 2005.

The respondent requests review of whether the claimant has met his burden of proving that he suffered personal by accident out of and in the course of his employment with respondent on January 10, 2005 and each and every working day thereafter, and whether claimant provided timely proper notice of this alleged injury. Unfortunately, respondent filed no brief in support of its request for review.

Equally unfortunate, claimant has not filed a brief but would presumably ask the Board to affirm the ALJ's preliminary hearing Order.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a laborer and according to his testimony, on January 10, 2005, he was picking up a rather heavy piece of pipe and immediately felt a pop followed by pain in his left shoulder. Thereafter, his fingers began to swell. He further testified that he told his supervisor, David Diaso, while in a group of other workers, of this injury on the following day, January 11, 2005. Only one of the other workers clearly corroborates claimant's version of this conversation, that being Mike Shields, a longtime friend of claimant's. Other co-workers suggest that while they were working with claimant during that day, they did not witness any acute injury and in fact, according to one co-worker, Mr. Stubby, claimant complained of shoulder pain shortly after they began working that morning, well before the claimed 11:00 a.m. injury.

Respondent denies claimant injured his left shoulder while working on January 10th, and alternatively contends that claimant hurt his shoulder while clearing limbs and debris from a coworker's yard following an ice storm. Claimant admits working with a chainsaw and clearing debris, but denies that he injured his shoulder in that activity. Respondent further contends that claimant failed to give notice on January 11th, as Mr. Diaso testified he only vaguely remembers a conversation where claimant may have mentioned his arm was sore. It was only on February 3, 2005, that Mr. Diaso was given notice of claimant's contention that he injured his left shoulder in an accident on January 11, 2005.

After tendering notice, claimant was referred to the Hutchison Clinic on February 15, 2005 for evaluation and treatment. He was seen by Dr. Christopher Rogers who was apparently advised that respondent did not believe that claimant had injured his shoulder in a work-related accident, but rather was injured on January 8th-9th while clearing limbs. After conservative treatment, claimant returned to regular duty work.

Claimant continued working without incident until May 18, 2005. On this date claimant complained of another injury to the left shoulder while removing a meter box lid.<sup>1</sup> Claimant was working alone on this date. He was again seen by Dr. Rogers, but later referred to another physician, Dr. Samuel Bourn. Claimant's complaints included intermittent numbness of the left fingers and a cervical spine MRI was performed as he suspected a disk was herniated.

On June 23, 2005, respondent had claimant examined by Dr. John F. McMaster, who issued a report which indicates claimant's "history. . . is consistent with an internal derangement of the left rotator cuff."<sup>2</sup>

After reviewing all of the evidence, including the depositions of claimant's coworkers, the ALJ ruled in claimant's favor and granted him ongoing medical treatment. The ALJ

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<sup>1</sup> Notice is not an issue in this second injury.

<sup>2</sup> Dr. McMaster's IME report at 5 (filed July 19, 2005).

noted, “[i]f we have [a] medically documented reinjury on or about May 18th, then all this discussion of January 10th just becomes largely irrelevant.”<sup>3</sup> The ALJ was merely acknowledging that for preliminary hearing purposes, the compensability of the first accident is moot if the second accident, to the same body part, is compensable. Although not specifically stated, it is reasonable to assume the ALJ ruled in claimant’s favor based upon the implicit finding that claimant was injured on May 18, 2005.<sup>4</sup>

The Board has considered the evidence contained within the record and finds no reason to disturb the ALJ’s preliminary hearing Order. Claimant has consistently described an accident on May 18, 2005 which he relayed to the treating physician. Under these facts and circumstances, the Board is persuaded that claimant has met his burden of proof to establish he sustained an accidental injury arising out of and in the course of his employment on May 18, 2005.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated July 22, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2005.

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BOARD MEMBER

c: Andrew L. Oswald, Attorney for Claimant  
Michael D. Streit, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>3</sup> P.H. Trans. at 41.

<sup>4</sup> Claimant’s Amended E-1 also references a series of injuries from January 10, 2005 and each and every working day thereafter, but there is very little evidence that he had any ongoing problems after his release to return to work and up to May 18, 2005.